

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

FAIRBANKS GOLD MINING, INC., a ) 3:10-cv-00492-ECR-WGC  
Delaware Corporation, )

Plaintiff, )

vs. )

Order

D&D TIRE, INC., a Nevada )  
Corporation; and PURCELL TIRE & )  
RUBBER COMPANY, a Missouri )  
Corporation, )

Defendants. )

D&D TIRE, INC., a Nevada )  
Corporation; and PURCELL TIRE & )  
RUBBER COMPANY, a Missouri )  
Corporation, )

Third Party Plaintiffs, )

vs. )

DURATRAY, INC., a Delaware )  
Corporation; DURATRAY )  
INTERNATIONAL, a foreign )  
Corporation; CONYMET DURATRAY )  
NORTH AMERICAN OPERATIONS, LLC, a )  
foreign limited liability company; )  
ROE CORPORATIONS I-V; PAUL )  
DIMARTINI, an individual; and )  
BRITT JOHNSON, an individual, )

Third Party Defendants. )

Now pending are a motion to dismiss (#22) filed by Third Party  
Defendants Paul A. DiMartini and Britt T. Johnson, and three motions

1 to dismiss (#37, 48, and 49) filed by Third Party Defendant  
2 Duratray, Inc.

3 **I. Factual Background**

4 Plaintiff Fairbanks Gold Mining, Inc. ("Fairbanks") is a  
5 Delaware corporation with its principal place of business in  
6 Fairbanks, Alaska. (Compl. ¶ 3 (#1).) Defendant/Third Party  
7 Plaintiff D&D Tire, Inc. ("D&D") is a Nevada corporation doing  
8 business in the state of Nevada. (Am. Third Party Compl. ¶ 1(#44)).  
9 Defendant/Third Party Plaintiff Purcell Tire and Rubber Company  
10 ("Purcell") is a Missouri corporation doing business in the state of  
11 Nevada. (Id. ¶ 2.) On May 1, 2008, Purcell acquired D&D through a  
12 purchase of owners Paul DiMartini's and Britt Johnson's stock. (Id.  
13 ¶ 19.) Duratray International is a foreign corporation with its  
14 principal place of business in Australia doing business throughout  
15 the United States. (Id. ¶ 4). Conymet Duratray North American  
16 Operations, LLC ("DNA") is a Texas limited liability company doing  
17 business throughout the United States. (Id. ¶ 5). Duratray, Inc. is  
18 a Delaware corporation doing business throughout the United States  
19 and, upon information and belief, the successor in interest to DNA  
20 (Id. ¶ 3). Defendants further allege in their Amended Third Party  
21 Complaint (#44) that Duratray, Inc., Duratray International, and DNA  
22 are affiliated or subsidiary entities of one another, owned and  
23 controlled by the same officers and directors, agents of one another  
24 acting within the course of that relationship, and subject to the  
25 right of control or authorized to act on behalf of each other (all  
26 three Duratray entities will hereafter be collectively referred to  
27 as "Duratray") (Id. ¶¶ 6-7).

1 Duratray is a supplier of light weight truck bodies for use on  
2 large mining trucks. (Id. ¶ 11). In June 2007, D&D and Duratray  
3 began discussions regarding D&D serving as a distributor of Duratray  
4 products, including the light weight truck bodies. (Id. ¶ 12).  
5 Duratray agreed to have D&D serve as a distributor of its products.  
6 (Id. ¶ 13).

7 In December 2007, Fairbanks and D&D began discussions about  
8 Fairbanks purchasing four (4) Duratray truck bodies for its  
9 operations in Fairbanks, Alaska. (Id. ¶ 14). Shortly after Purcell  
10 acquired D&D on May 1, 2008, Duratray informed Purcell/D&D that it  
11 could ship four truck bodies at a price of \$143,133.00 each, plus  
12 \$83,000.00 each in shipping and \$2,500.00 in on site training. (Id.  
13 ¶ 26). Purcell/D&D relayed the quote to Fairbanks. (Id. ¶ 27). On  
14 May 19, 2008, Fairbanks notified Purcell/D&D that it would now like  
15 five truck bodies instead of four. (Id. ¶ 31). Purcell/D&D  
16 forwarded the request to Duratray and confirmed the price quote for  
17 five truck bodies at \$143,738.00 per unit, \$83,000.00 per unit for  
18 freight and assembly, \$2,500.00 for on site training (for a total of  
19 \$1,136,190.00), plus reasonable and customary travel and expenses  
20 for one field engineer on site. (Id. ¶ 32).

21 In June 2008, Duratray informed Purcell/D&D that all requests  
22 to order the truck bodies would need to be reevaluated in light of  
23 rapid price increases due to a steel shortage. (Id. ¶ 35).  
24 Fairbanks subsequently sent Purcell/D&D a Purchase Order for five  
25 Duratray truck bodies and accompanying charges totalling  
26 \$1,136,190.00; Purcell/D&D forwarded it to Duratray. (Id. ¶ 36).  
27 Duratray then informed Purcell/D&D that it could only supply three  
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1 of the truck bodies at the original price, and that each additional  
2 body would be approximately \$43,000.00 extra. (Id. ¶ 38).

3 It was at about this time that Purcell discovered that D&D, the  
4 company it acquired, never obtained a fully executed distributor  
5 agreement with Duratray. (Id. ¶ 39). Negotiations broke down and  
6 Fairbanks never received any of the truck bodies. (See id. ¶¶ 40-  
7 46).

## 8 **II. Procedural Background**

9 Plaintiff Fairbanks filed its complaint (#1) on August 9, 2010.  
10 On September 13, 2010, Defendants Purcell and D&D filed their answer  
11 and third party complaint (#11) against Third Party Defendants  
12 Duratray, Inc., Paul DiMartini, and Britt Johnson. Third Party  
13 Defendants DiMartini and Johnson subsequently filed their motion to  
14 dismiss (#22) the third party complaint pursuant to Federal Rule of  
15 Civil Procedure 12(b)(6). Third Party Plaintiffs Purcell and D&D  
16 filed their response (#34) on December 6, 2010, and Third Party  
17 Defendants DiMartini and Johnson filed their reply (#36) on December  
18 17, 2010. On December 22, 2010, Third Party Defendant Duratray,  
19 Inc. filed a motion to dismiss (#37) the third party complaint  
20 pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

21 On January 10, 2011, Third Party Plaintiffs filed their amended  
22 third party complaint (#44), adding Duratray International and DNA  
23 as Third Party Defendants, and then filed their response (#45) to  
24 Third Party Defendant Duratray's prior motion to dismiss (#37) for  
25 lack of personal jurisdiction. Third Party Defendant Duratray, Inc.  
26 filed its response (#47) on January 20, 2011, as well as a renewed  
27 motion to dismiss (#48) due to lack of personal jurisdiction and a  
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1 motion to dismiss (#49) pursuant to Rule 12(b)(6) for failure to  
2 state a claim. These motions also include Third Party Defendant  
3 Duratray, Inc.'s replies in support of their prior motions to  
4 dismiss (#37, 48, and 49) and incorporate their prior motion to  
5 dismiss (#37) for lack of jurisdiction by reference. Third Party  
6 Plaintiffs filed their response (#51) to the renewed motion to  
7 dismiss (#48) for lack of personal jurisdiction and the motion to  
8 dismiss (#49) for failure to state a claim on February 7, 2011.

9 **III. Third Party Defendant Duratray, Inc.'s Motion to Dismiss for**  
10 **Lack of Personal Jurisdiction (# 48)**

11 **A. Legal Standard**

12 Rule 12(b)(2) of the Federal Rules of Civil Procedure permits a  
13 defendant to move to dismiss a complaint for lack of personal  
14 jurisdiction. "Where a defendant moves to dismiss a complaint for  
15 lack of personal jurisdiction, the plaintiff bears the burden of  
16 demonstrating that jurisdiction is appropriate." Schwarzenegger v.  
17 Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004) (citing  
18 Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990)). Where a  
19 district court receives only written submissions, the plaintiff need  
20 only make a prima facie showing of jurisdictional facts.  
21 Schwarzenegger, 374 F.3d at 800. In determining whether a plaintiff  
22 has met this burden, uncontroverted allegations in the complaint  
23 must be taken as true, and conflicts between the facts contained in  
24 the parties' affidavits must be resolved in plaintiff's favor. Rio  
25 Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir.  
26 2002) (citing AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588  
27 (9th Cir. 1996)).

1       Where, as here, there is no applicable federal statute  
2 governing personal jurisdiction, this Court looks to the law of the  
3 state of Nevada. See Fed. R. Civ. P. 4(k)(1)(A). Nevada's long-arm  
4 statute permits personal jurisdiction to the full extent of the  
5 Constitution. Trump v. Eighth Judicial Dist. Court, 857 P.2d 740,  
6 747 (Nev. 1993); NEV. REV. STAT. § 14.065(1). Hence, we need only  
7 consider principles of due process, which require that a defendant  
8 must have at least "minimum contacts" with the forum such that the  
9 exercise of jurisdiction would "not offend traditional notions of  
10 fair play and substantial justice." Int'l Shoe Co. v. Washington,  
11 326 U.S. 310, 316 (1945) (internal quotation marks and citation  
12 omitted).

13       **A. Discussion<sup>1</sup>**

14       The Ninth Circuit utilizes a three-part test for analyzing a  
15 claim of specific personal jurisdiction:

16       (1) The non-resident defendant must purposefully direct his  
17 activities or consummate some transaction with the forum or  
18 resident thereof; or perform some act by which he  
19 purposefully avails himself of the privilege of conducting  
20 activities in the forum, thereby invoking the benefits and  
21 protections of its laws;

22       (2) the claim must be one which arises out of or relates to  
23 the defendant's forum-related activities; and

24       (3) the exercise of jurisdiction must comport with fair  
25 play and substantial justice, i.e. it must be reasonable.

26       Schwarzenegger, 374 F.3d at 802 (citing Lake v. Lake, 817 F.2d 1416,  
27 1421 (9th Cir. 1987)). The plaintiff bears the burden of satisfying  
28 the first two prongs of the test. Sher, 911 F.2d at 1361.

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29       <sup>1</sup>It appears that Third Party Plaintiffs do not dispute Third  
30 Party Defendant Duratray, Inc.'s assertion that this Court does not  
31 have general jurisdiction over Duratray, Inc. Accordingly, the Court  
32 addresses only specific personal jurisdiction.

1 If the plaintiff fails to satisfy either of these prongs,  
2 personal jurisdiction is not established in the forum  
3 state. If the plaintiff succeeds in satisfying both of the  
4 first two prongs, the burden then shifts to the defendant  
5 to "present a compelling case" that the exercise of  
6 jurisdiction would not be reasonable.

7 Schwarzenegger, 374 F.3d at 803 (quoting Burger King Corp. v.  
8 Rudzewicz, 471 U.S. 462, 477 (1985)).

9 Third Party Defendant Duratray, Inc. argues that Third Party  
10 Plaintiffs cannot possibly establish personal jurisdiction over  
11 Duratray, Inc. because it was not formed until May 20, 2008 and had  
12 no contacts with Nevada until April 2009, well after the events  
13 underlying this suit took place. For this reason, Duratray, Inc.  
14 argues that it does not have sufficient minimum contacts with  
15 Nevada, and that the claims do not arise out of what little contact  
16 it did have with the state.

17 It appears, however, that Third Party Plaintiffs seek to impute  
18 DNA and/or Duratray International's contacts with Nevada to  
19 Duratray, Inc. for purposes of personal jurisdiction. While it is  
20 true that a parent-subsidary relationship alone is insufficient to  
21 attribute the contacts of the subsidiary to the parent, there are  
22 two exceptions to that rule: (1) where the subsidiary is the  
23 parent's alter ego, or (2) where the subsidiary is the parent's  
24 agent. Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328  
25 F.3d 1122, 1133 (9th Cir. 2003). Additionally, DNA's contacts with  
26 Nevada may be imputed to Duratray, Inc. and/or Duratray  
27 International as successors in interest to DNA if the law of the  
28 forum, Nevada, would hold either liable for the actions of their  
alleged predecessor. See In re Nazi Era Cases Against German

1 Defendants Litig., 153 F.App'x 819, 822-23 (3d Cir. 2005); Purdue  
2 Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 783-84  
3 (7th Cir. 2003); Patin v. Thoroughbred Power Boats Inc., 294 F.3d  
4 640, 654 (5th Cir. 2002); Williams v. Bowman Livestock Equip. Co.,  
5 927 F.2d 1128, 1132 (10th Cir. 1991); City of Richmond v. Madison  
6 Mgmt. Grp., Inc., 918 F.2d 438, 454 (4th Cir. 1990).

7       In this case, there are facts that seem to indicate that  
8 Duratray, Inc. was formed as a successor in interest to DNA, which  
9 may in turn have functioned as an agent of Duratray International.  
10 There are further indicators that one or more of these entities may  
11 be a subsidiary of one or more of the others. However, it is  
12 unclear from the record who and what entities exactly were involved  
13 in the facts underlying this suit and how they are related to each  
14 other. In a similar case, the Ninth Circuit found that the district  
15 court abused its discretion in denying a party's motion for  
16 jurisdictional discovery in order to determine if a subsidiary's  
17 contacts could be imputed to its parent for purposes of  
18 jurisdiction. See Harris Rutsky, 328 F.3d at 1135; see also Chan v.  
19 Soc'y Expeditions, Inc., 39 F.3d 1398, 1406 (9th Cir. 1994)  
20 (remanding to district court because record facts were insufficient  
21 to determine whether subsidiary's minimum contacts could be imputed  
22 to parent); Wells Fargo & Co v. Wells Fargo Exp. Co., 556 F.2d 406,  
23 430 n. 24 (9th Cir. 1977) ("[I]t is clear that a court may allow  
24 discovery to aid in determining whether it has in personam or  
25 subject matter jurisdiction.") (citations omitted). As was the case  
26 in Harris Rutsky, the facts here are simply not sufficiently  
27 developed to render a decision on the issue of personal jurisdiction  
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1 over Third Party Defendant Duratray, Inc. Accordingly, the Motion  
2 to Dismiss Based on Lack of Personal Jurisdiction (#48) will be  
3 denied without prejudice in order to permit jurisdictional  
4 discovery.

5 **IV. Third Party Defendant Duratray, Inc.'s Motion to Dismiss for**  
6 **Failure to State a Claim (# 49)**

7 **A. Legal Standard**

8 Third Party Defendant Duratray, Inc. has filed a motion to  
9 dismiss (#49) Third Party Plaintiffs' amended third party complaint  
10 (#44) pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule  
11 8(a)(2) requires only "a short and plain statement of the claim  
12 showing that the pleader is entitled to relief." While this  
13 pleading standard does not require detailed factual allegations, it  
14 does demand more than "a formulaic recitation of the elements of a  
15 cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
16 (2007) (citation omitted). A defendant must be put on fair notice  
17 of a plaintiff's claims and the grounds upon which they rest. Id.

18 In considering a 12(b)(6) motion, all material allegations in  
19 the complaint are accepted as true and are construed in a light most  
20 favorable to the non-movant. Cahill v. Liberty Mut. Ins. Co., 80  
21 F.3d 336, 337-38 (9th Cir. 1996). To survive a motion to dismiss, a  
22 complaint must contain sufficient facts to "state a claim to relief  
23 that is plausible on its face." Twombly, 550 U.S. at 570. "A claim  
24 has facial plausibility when the plaintiff pleads factual content  
25 that allows the court to draw the reasonable inference that the  
26 defendant is liable for the misconduct alleged." Ashcroft v. Iqbal,  
27 -- U.S. --, 129 S.Ct. 1937, 1949 (2009). "Factual allegations must  
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1 be enough to raise a right to relief above the speculative level.”  
2 Twombly, 550 U.S. at 555 (citation omitted). Otherwise, the  
3 complaint must be dismissed.

4 **B. Discussion**

5 Third Party Plaintiffs allege in their amended third party  
6 complaint (#44) that Duratray, Inc., Duratray International, and DNA  
7 are the alter egos of each other. Pursuant to Nevada law, a  
8 plaintiff must prove the following elements in order to establish an  
9 alter ego claim:

10 (1) the corporation must be influenced and governed by the  
11 person asserted to be its alter ego; (2) there must be such  
12 unity of interest and ownership that one is inseparable from  
13 the other; and (3) the facts must be such that adherence to  
14 the fiction of a separate entity would, under the  
15 circumstances, sanction a fraud or promote injustice.

16 Truck Ins. Exch. v. Palmer J. Swanson, Inc., 189 P.3d 656, 660 (Nev.  
17 2008).

18 In support of their alter ego claim, Third Party Plaintiffs  
19 allege that Duratray, Inc., Duratray International, and DNA are  
20 affiliated or subsidiaries of one another and are all controlled by  
21 the same officers and directors. (Am. Third Party Compl. (#44) ¶¶ 6,  
22 51). Third Party Plaintiffs further allege that Duratray, Inc.’s  
23 listed principal place of business in Denver, Colorado is the same  
24 address as Duratray International’s United States office, and  
25 Duratray, Inc.’s registered Texas location is the same address  
26 registered by DNA as its principal place of business. (Id. ¶¶ 49-  
27 50). Third Party Plaintiffs further allege that Duratray, Inc. is  
28 the successor in interest to DNA. (Id. ¶ 3). Finally, by  
collectively referring to the three Duratray entities as “Duratray,”

1 (Id. ¶ 6), Third Party Plaintiffs allege that all three Duratray  
2 were involved in all the relevant facts underlying their claims.

3 Third Party Defendant Duratray, Inc. argues that all of Third  
4 Party Plaintiffs' allegations are mere conclusory allegations, with  
5 the exception of the various addresses of the three Duratray  
6 entities. However, the fact that the three entities are, at the  
7 very least, affiliated with each other and controlled by the same  
8 people is not a conclusory allegation, but a factual matter  
9 suggestive of alter ego liability. While it is true that these  
10 facts alone are probably insufficient to prove an alter ego claim,  
11 see Bonanza Hotel & Gift Shop, Inc. v. Bonanza No. 2, 596 P.2d 227,  
12 229 (Nev. 1979), they do "raise a right to relief above the  
13 speculative level." Twombly, 550 U.S. at 555. The inference of  
14 alter ego liability is further supported by the allegation that  
15 Duratray, Inc. is a successor in interest to DNA. Finally, Third  
16 Party Plaintiffs have alleged that all three Duratray entities  
17 engaged in the events that form the basis of this suit. These facts  
18 are equally supportive of successor and/or agency relationships  
19 among the three entities. Reading the complaint in its entirety, it  
20 is apparent that Third Party Plaintiffs have properly pleaded their  
21 claim against Duratray, Inc. Thus, Third Party Plaintiffs' alter  
22 ego claim for relief survives.

### 23 V. Conclusion

24 Third Party Defendant Duratray Inc.'s motion to dismiss (#48)  
25 based on personal jurisdiction must be denied. Until the  
26 jurisdictional facts are further developed, the Court is unable to  
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1 rule on the issue. Third Party Defendant Duratray, Inc. may renew  
2 its motion after the completion of jurisdictional discovery.

3 IT IS, THEREFORE, HEREBY ORDERED that Third Party Defendant  
4 Duratray, Inc.'s motion to dismiss (#48) for lack of personal  
5 jurisdiction is DENIED without prejudice.

6 IT IS FURTHER ORDERED that Third Party Defendant Duratray,  
7 Inc.'s motion to dismiss (#49) for failure to state a claim is  
8 DENIED.

9 IT IS FURTHER ORDERED that Third Party Defendants DiMartini and  
10 Johnson's motion to dismiss (#22) and Third Party Defendant  
11 Duratray, Inc.'s motion to dismiss (#37) are DENIED as moot due to  
12 the subsequent filing of an amended third party complaint (#44).

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16 DATED: September 23, 2011.

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UNITED STATES DISTRICT JUDGE

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